

**First American Title Insurance Company of New York
CURRENT DEVELOPMENTS
SPECIAL EDITION**

New York's Statutory Short Form Power of Attorney ("SSF Power"), and a form identified as the Statutory Major Gifts Rider ("SMGR"), are in Title 15 ("Statutory short form and other powers of attorney for financial and estate planning") of Article 5 of New York's General Obligations Law ("GOL"), which has been amended by Chapter 644 of the Laws of 2008 ("Chapter 644") effective September 1, 2009. Chapter 340 of the Laws of 2010 ("Chapter 340"), effective September 12, 2010, further amends Title 15, including the form of the SSF Power and the SMGR, now identified as a Statutory Gifts Rider ("SGR"). This Bulletin sets forth changes made by Chapter 340. Section references in the text are to the General Obligations Law.

According to the Memoranda of Support accompanying the Bills enacted as Chapter 340, "[a]fter the effective date of [Chapter 644], it became apparent that there was a need to clarify the application of the Statutory Gifts Rider and limit the types of transactions subject to this law". More particularly, Chapter 644 has been interpreted as requiring an SMGR even on the transfer of a real property interest for consideration and questions have been raised as to whether Chapter 644 requires a SSF Power for transactions for which the statutory form has not been typically used, such as the execution by an Agent of a condominium unit owner's power of attorney to a Board of Managers.

The amendments made by Chapter 340 are deemed to have been in full force and effect on and after September 1, 2009. However, any SSF Power and SMGR executed between September 1, 2009 and September 11, 2010 as required by Chapter 644 remains valid.

OTHER TRANSFERS

Chapter 644 has been interpreted as requiring execution of a SMGR on the transfer of any property interest by an Agent acting under a SSF Power. Under Chapter 644, an SMGR is defined in Subdivision 14 of Section 5-1501 ("Definitions") as "a document by which the principal may supplement a statutory short form power of attorney to authorize major gift transactions and other transfers..." Under Subdivision 2 of Section 5-1501B ("Creation of a valid power of attorney; when effective") "...to be valid for the purpose of authorizing the agent to make any gift or other transfer...a statutory short form power of attorney must...be accompanied by a valid statutory major gifts rider". Section "(h)" of the SSF Power states that "[i]n order to authorize your agent to make major gifts and other transfers of your property, you must...execute a Statutory Major Gifts Rider at the same time as this instrument".

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With one exception, each reference to executing a SMGR for “other transfers” has been removed. The “Modifications: (Optional)” section of the SSF Power, as amended by Chapter 340, continues to include the following text:

“However, you cannot use this Modifications section to grant your agent authority to make gifts or changes to interests in your property. If you wish to grant your agent such authority, you must complete the Statutory Gifts Rider”.

It is believed that retention of “changes to interests in your property” in this Section “(g)” of the SSF Power was an oversight; the legislative intention is otherwise clear. Under Title 15 as amended by Chapter 340, a SGR must be executed concurrently with a SSF Power when the total amount of gifts made by the Agent under a Power in any one calendar year exceeds five hundred dollars.

EXCLUDED TRANSACTIONS

Title 15, as amended by Chapter 644, has been interpreted as requiring the use of a SSF Power, or a non-statutory power complying with the requirements of that Chapter, for transactions in which a SSF Power has not typically been used. For example, certain recording offices have rejected condominium unit owner powers of attorney to Boards of Managers for non-compliance with the requirements of Title 15.

Chapter 340 amends the definition of “Power of attorney” in Section 5-1501 to exclude the powers of attorney listed in new Section 1501C (“Powers of attorney excluded from this title”). The following are among the types of transactions excluded from the application of Title 15:

“A power to the extent it is coupled with an interest in the subject of the power”

“A power given to or for the benefit of a creditor in connection with a loan or other credit transaction”

“A power given to facilitate [the] transfer or disposition of one or more specific stocks, bonds or other assets, whether real, personal or intangible”.

“A power authorizing a third party to prepare, execute, deliver, submit and/or file a document or instrument with a government or governmental subdivision, agency or instrumentality or other third party”.

It is unclear when the last two of the above-listed exclusions are to be applied in real estate transactions.

“A power contained in a partnership agreement, limited liability company operating agreement, declaration of trust, declaration of condominium, condominium by-laws, condominium offering plan or other instrument or agreement or instrument governing the internal affairs of an entity authorizing a director, officer, shareholder, employee, partner, limited partner, member, unit owner, manager or other person to take lawful action relating to that entity”.

“A power given to a condominium managing agent to take action in connection with the use, management and operation of a condominium unit”

The last two provisions are intended to exclude the usual unit owner’s power of attorney to a Board of Managers from the requirements of Title 15.

However, Section 5-1501C further provides that “[n]othing in this section shall be deemed to prohibit use of a statutory short form power of attorney or a nonstatutory power of attorney in connection with any of the transactions described in this section”.

PRINCIPALS AND AGENTS

A “Power of Attorney” is executed by a Principal, which term is defined in Section 5-1501 under Chapter 644 to mean “an individual who is eighteen years of age or older who executes a power of attorney”. Chapter 340 amends the definition of “Principal” to make it clear that the individual who is the Principal must be “acting for himself or herself and not as a fiduciary or an official of any legal, governmental or commercial entity”.

Section 5-1508 (“Co-agents and successor agents”) has been amended to resolve the question as to whether an agent must be a natural person. New subdivision 4 provides that “[a]ny person, other than an estate or trust, may act as an agent, co-agent or successor agent under a power of attorney”. A “Person” continues to be defined in Section 5-1501 as being:

“an individual, whether acting for himself or herself, or as a fiduciary or as an official of any legal, governmental or commercial entity (including, but not limited to, any such entity identified in this subdivision), corporation, business trust, estate, venture, government, governmental subdivision, government agency, government entity, government instrumentality, public corporation, or any other legal or commercial entity”.

A Power executed by a Principal is, under Section 5-1501B, valid notwithstanding that it is later executed by the Agent, even when the Principal becomes incapacitated during the interim period. Chapter 340 amends Subdivision 1(c) of Section 5-1501B to clarify that a power of attorney is valid if any Agent and, if applicable, any Successor Agent later executes the Power.

Further, new Subdivision 7 of Section 5-1504 (“Acceptance of statutory short form power of attorney”) provides that a SSF Power or a non-statutory power of attorney (“Power”) shall be accepted for recording when there is more than one Agent if signed by only one Agent, unless the Agents are required to act jointly, in which case all agents with joint authority must execute the Power for it to be recorded. Signatures of agents, as well as the Principal, still must be acknowledged for the Power to be accepted for recording.

When there are multiple Agents with several authority or a Successor Agent or Successor Agents appointed, and the Power is recorded with the signature(s) of less than all of them, there has been a question as to how the Power could be later signed by the other Agent(s) or Successor Agent(s) and then recorded, particularly if the original, recorded Power was unavailable. Subdivision 7 of Section 5-1504 provides that “[w]hen a successor agent or co-agent authorized to act separately from any other agents presents a certified copy of a recorded [SSF Power] or non-statutory power of attorney with the agent’s signature acknowledged, the instrument shall be accepted for recording”.

Subdivision 2 of Section 5-1508 (“Co-agents and successor agents”), under Chapter 644, provides that successor agents can be designated to serve if “every” initial or predecessor Agent is no longer serving as an agent. As amended, the subdivision now provides, instead, that Successor Agents can be designated to serve if “any” initial or predecessor agent is no longer serving as an Agent. The SSF Power, as revised by Chapter 340, has provision for the principal to insert specific “Rules” governing the succession of agents.

REVOCATION

Subdivision 6 of Section 5-1511 (“Termination or revocation of power of attorney; notice”), under Chapter 644, provides that execution of a Power revokes any Power previously executed by the Principal unless the Principal expressly provides otherwise. Under amended Subdivision 6, execution of a Power does not automatically revoke any prior Power executed by the Principal. To the same effect, Section “(e)” of the SSF Power, as revised by Chapter 340, states that “[t]his Power of Attorney does not revoke any Powers of Attorney previously executed by me unless I have stated otherwise below, under ‘Modifications’”. Section 31 of Chapter 340 provides that “any revocation of a prior power of attorney that was delivered to the agent before the effective date of this act” remains effective.

If a previous appointment of an Agent is not revoked, under Section “(e)” of the revised SSF Power, “each agent can act separately unless you indicate under “Modifications” [in the SSF Power] that the agents with the same authority are to act together”.

Subdivision 3 of Section 5-1511, under Chapter 644, provides that a Principal may revoke a Power by delivering notice of revocation to the Agent. As amended by Chapter 340, Subdivision 3 states that notice to an Agent that the Power is no longer effective can be made “in person or by sending a signed and dated revocation by mail, courier, electronic transmission or facsimile to the agent’s last known address”.

Further, under new Subdivision 5(B) of Section 5-1511, “(t)ermination of an agent’s authority or of the power of attorney is not effective as to the agent until the agent has received a revocation as required by subdivision three of this section. An agent is deemed to have received a revocation when it has been delivered to the agent in person, or within a reasonable time after it has been sent by mail, courier, electronic transmission or facsimile in accordance with subdivision three of this section”.

Amended Subdivision 4 of Section 5-1511 also states that when a Power is recorded the Principal shall also record a revocation of the Power “in the office in which the power of attorney is recorded”. The requirement in Chapter 644 that a third party have actual notice of the revocation for it to be effective has been removed.

Subdivision 2, under Chapter 644, also provides that when the Principal and the Agent are married the Agent’s authority terminates on their divorce, the annulment of the marriage, or the issuance of a “declaration of nullity”, unless stated otherwise in the Power. Chapter 340 removes reference to a “declaration of nullity”.

Subdivision 5 of Section 5-1504 (“Acceptance of statutory short form power of attorney”), under Chapter 644, authorizes a third party to require an Agent to execute an acknowledged affidavit with specific representations to confirm that the Power is in full force and effect. Chapter 340 amends that Subdivision to add a provision allowing the affidavit to state, when the Agent is the Principal’s spouse, that the agent “does not have actual notice that the marriage has been terminated by divorce or annulment” or that, notwithstanding a divorce or annulment, the Power expressly provides that divorce or annulment does not terminate the Agent’s authority.

DOMICILE

Section 5-1512 (“Powers of attorney executed in other jurisdictions”), under Chapter 644, provides that “a power of attorney executed in another state or jurisdiction in compliance with the law of that state or jurisdiction or the law of this state is valid in this state, regardless of whether the principal is a domiciliary of” New York State.

As amended by Chapter 340, under Section 5-1512, a Power executed, as required by Section 5-1501B (“Creation of a valid power of attorney; when effective”), by a domiciliary of New York in another state or jurisdiction is valid in New York. This does not appear to be a substantive change.

However, that Section, as amended, further states that “[a] power of attorney executed in this State by a domiciliary of another state or jurisdiction in compliance with the law of that state or jurisdiction or the law of this state is valid” in New York.

WITNESSES STATUTORY GIFTS RIDER

As has been the case for a SMGR under Chapter 644, the signature of a Principal to a SGR must be “witnessed by two persons who are not named in the instrument as permissible recipients of gifts”. Chapter 340 amends Subdivision 9 of Section 5-1514 (now “Major Gifts and other transfers”) to allow the person acknowledging the signature of the Principal on the SGR to be one of the witnesses.

GRANT OF AUTHORITY

A Principal grants his or her Agent the authority to take certain actions by initialing in brackets next to subjects listed in the Grant of Authority Section “(f)” of the SSF Power, or by the Principal completing and initialing item “P” for “[e]ach of the matters identified by the following subjects”, which subjects are then identified by reference to the applicable letter in the list. The “subjects” listed are defined in Sections 5-1502-A through 5-1502N.

Section 5-1502A (“Construction-real estate transactions”), Section 5-1502B (“Construction-chattel and goods transactions”), and Section 5-1502C (“Construction-bond, share and commodity transactions”), as amended by Chapter 340, provides that the Principal, by initialing that subject, as applicable, in the Grant of Authority section of the SSF Power (or by including that subject by reference in item “P”), authorizes the agent for such transactions to create, modify or revoke a trust, unless doing so constitutes a gift transaction for which a SGR is required. Similarly, Section 5-1502L (“Construction-retirement benefit transactions”) has been amended; initialing item “L” on the list of subjects in the Grant of Authority section of the SSF Power, or by listing “L” in item “P”, authorizes the Agent to “prepare, execute and deliver” a trust agreement for retirement benefit transactions, unless doing so constitutes a gift, for which a SGR is required.

LAW REVISION COMMISSION (“LRC”)

Section 30 of Chapter 340 directs the LRC to study the implementation of Title 15 and, in doing so, to “consult with individuals and entities regularly engaged in the utilization of such title, and those individuals and entities affected by the provisions of such title”.

The LRC shall submit to the Governor and the Legislature, the text of Chapter 340 states by September 1, 2010, a preliminary report with recommendations regarding the SGR; a further report is to be submitted on or before January 1, 2012.

The First American form with the revised SSF Power and SGR accompanies this Bulletin.

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